Filed 11/17/16 P. v. Martinez CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR HUGO MARTINEZ,

Defendant and Appellant.

F068723

(Kern Super. Ct. No. DF10859A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Rita Barker and Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.*

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, William K. Kim and Nora S. Weyl, Deputy Attorneys General, for Plaintiff and Respondent.

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* On August 29, 2016, this court removed Rita Barker as defendant's counsel of record in this appeal, appointed Robert L.S. Angres in her place, and vacated submission. On September 26, 2016, Angres adopted the briefing that had been previously filed in this case, declined to request oral argument, and stated he was prepared to submit the matter.

INTRODUCTION

Appellant/defendant Victor Hugo Martinez, an inmate at Kern Valley State Prison (KVSP), was charged with possession of a weapon while confined in a penal institution (Pen. Code, § 4502, subd. (a).) Defendant was serving a determinate prison sentence at the time of the offense. He filed pretrial motions for discovery and dismissal of his case pursuant to *Murgia v. Municipal Court for Bakersfield Judicial Dist.* (1975) 15 Cal.3d 286 (*Murgia*), and argued he was subject to discriminatory prosecution because he would not have been charged with a crime if he had been serving a life term. As we will explain, the court partially granted and denied his discovery motions, and subsequently denied his motion to dismiss. Defendant then pleaded no contest to the charge, admitted the prior conviction allegation, and was sentenced to the second strike term of four years.

Defendant filed a notice of appeal, and requested and obtained a certificate of probable cause. (See, e.g., *People v. Moore* (2003) 105 Cal.App.4th 94, 100 [denial of *Murgia* motions for discovery and dismissal cognizable on appeal after guilty plea].) He contends the court should have granted all aspects of his various discovery motions, and it should have granted his motion to dismiss since he was only prosecuted because he was not serving a life term. We affirm.

FACTS[1]

On July 28, 2011, defendant was in KVSP's "Receiving and Release Facility," which processed incoming and outgoing inmates. Every inmate that entered and left that facility went through a metal detector.

At 6:00 a.m., Correctional Officer Jack Ott assumed custody of defendant in that facility. Defendant had already passed through the metal detector to enter the facility.

At 6:55 a.m., Officer Ott accompanied defendant to use the restroom. Ott searched defendant and did not find any contraband.

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[1] The facts are from the preliminary hearing transcript since defendant entered a guilty plea.

Officer Ott watched defendant defecate and then searched defendant's feces. Ott found a plastic bindle and washed it with soap and water. He opened the bindle and found a piece of metal, which was two inches long and one inch wide. The metal was wrapped in a sheet and sharpened to a point. Ott believed the item could be used as a weapon to hurt someone.

The charges

On October 10, 2012, an information was filed which charged defendant with count I, possession of a weapon while confined in a penal institution, with one prior strike conviction and two prior prison term enhancements.

***MURGIA* MOTIONS**

After the information was filed, defendant filed pretrial motions which asserted the criminal case should be dismissed because it was filed as a result of a discriminatory prosecution – that he would not have been charged with felony possession of a weapon in prison if he had been serving a life term, and he was only charged because he was serving a lesser determinate term. To support this claim, defendant filed motions for discovery of various documents from the California Department of Corrections and Rehabilitation (CDCR), KVSP, and the Kern County District Attorney's Office.

We will begin by reviewing *Murgia* motions for discovery and dismissal, and then turn to the procedural history of this case.

Discriminatory prosecution

"In the ordinary case, 'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his [or her] discretion.' [Citation.]" (*United States v. Armstrong* (1996) 517 U.S. 456, 464 (*Armstrong*); *People v. Lucas* (1995) 12 Cal.4th 415, 477.) "As a result, '[t]he presumption of regularity supports' their prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their

official duties. [Citation.]" (*Armstrong, supra*, 517 U.S. at p. 464.) However, the People's discretion to prosecute and what to charge is subject to "constitutional constraints" including "the equal protection component of the Due Process clause of the Fifth Amendment." (*Ibid*.)

As first set forth in *Murgia, supra*, 15 Cal.3d 286, in order to establish a claim of discriminatory prosecution, " 'the defendant must prove: (1) "that he has been deliberately singled out for prosecution on the basis of *some invidious criterion*"; and (2) that "the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities." ' " (*Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 832 (*Baluyut*), italics added; *Murgia, supra*, 15 Cal.3d at p. 298.) " '[A]n invidious purpose for prosecution is one that is arbitrary and thus unjustified because it bears no rational relationship to legitimate law enforcement interests ....' [Citation.]" (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 568–569.)

"Although referred to for convenience as a 'defense,' a defendant's claim of discriminatory prosecution goes not to the nature of the charged offense, but to a defect of constitutional dimension in the initiation of the prosecution. [Citation.] The defect lies in the denial of equal protection to persons who are singled out for a prosecution that is 'deliberately based upon an unjustifiable standard *such as race, religion, or other arbitrary classification*.' [Citation.] When a defendant establishes the elements of discriminatory prosecution, the action must be dismissed even if a serious crime is charged unless the People establish a compelling reason for the selective enforcement. [Citations.]" (*Baluyut, supra*, 12 Cal.4th at pp. 831–832.)

"Unequal treatment which results simply from laxity of enforcement or which reflects *a nonarbitrary basis for selective enforcement* of a statute does not deny equal protection and is not constitutionally prohibited discriminatory enforcement. [Citations.] However, the unlawful administration by state officers of a state statute that is fair on its face, which results in unequal application to persons who are entitled to be treated alike,

denies equal protection if it is the product of intentional or purposeful discrimination. [Citation.]" (*Baluyut, supra,* 12 Cal.4th at p. 832, italics added.)

"[A]n equal protection violation does not arise whenever officials 'prosecute one and not [another] for the same act' [citation]; instead, the equal protection guarantee simply prohibits prosecuting officials from purposefully and intentionally singling out individuals for disparate treatment *on an invidiously discriminatory basis*." (*Murgia, supra,* 15 Cal.3d at p. 297, italics added.)

Discovery

Murgia also set forth the related concept of a defense motion for discovery of evidence to support a claim of discriminatory prosecution. (*Murgia, supra*, 15 Cal.3d at pp. 291, 293, 305.) "[T]raditional principles of criminal discovery mandate that defendants be permitted to discover evidence relevant to such a claim." (*Id*. at p. 306.) "Evidence of discriminatory enhancement usually lies buried in the consciences and files of the law enforcement agencies involved ….' [Citation.]" (*People v. Municipal Court (Street)* (1979) 89 Cal.App.3d 739, 748.)

In order to obtain discovery in support of a claim of discriminatory prosecution, the defendant must produce " '*some evidence* tending to show the existence of the essential elements of the defense,' discriminatory effect and discriminatory intent. [Citation.]" (*Armstrong, supra*, 517 U.S. at p. 468, italics added; *People v. Superior Court (Baez*) (2000) 79 Cal.App.4th 1177, 1189–1190 (*Baez*).)

Armstrong explained there was a " 'background presumption,' [citation] that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims." (*Armstrong, supra*, 517 U.S. at pp. 463–464.) "If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective

prosecution. It will divert prosecutors' resources and may disclose the Government's prosecutorial strategy." (*Id*. at p. 468.)

"In order to succeed on an actual discriminatory prosecution claim, a defendant 'must demonstrate that the … prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose." ' [Citation.] 'The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require *a correspondingly rigorous standard for discovery in aid of such a claim*.' [Citation.]" (*Baez, supra,* 79 Cal.App.4th at p. 1189, italics added; citing *Armstrong*, *supra*, 517 U.S. at p. 468.)

A defendant is thus entitled to discovery only "if the trial court concluded that he had produced 'some evidence' in support of his discriminatory prosecution claim. (*Baez, supra,* 79 Cal.App.4th at pp. 1190–1191.) We review orders that deny *Murgia* motions for discovery for an abuse of discretion. (*Baez, supra*, pp. 1190–1191.)

With these standards in mind, we turn to the lengthy procedural history of this case.

PROCEDURAL HISTORY

Initial discovery motions

On March 6, 2013, defendant filed a motion for release of records of materials and documents sought by subpoena duces tecum from third parties KVSP and CDCR, and asserted such documents implicated his constitutional rights.[2]

On the same date, defendant filed a motion pursuant to *Murgia* to compel discovery of certain documents and records to support a defense of discriminatory prosecution.

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[2] Defendant also filed a pretrial motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, for the court to conduct an in camera hearing and order discovery of the confidential personnel records for Officer Ott and two other correctional officers. The court denied defendant's request for an in camera review of the officers' personnel records, and denied his *Pitchess* motion. Defendant has not challenged this ruling.

In support of these motions, defendant asserted that when he was allegedly found in possession of the weapon, he was serving a determinate term with the earliest possible release date of January 2015. He intended to file a *Murgia* motion to dismiss the charge filed against him on the ground that he was being arbitrarily discriminated against on "an unjustifiable standard, i.e., he is not serving a life sentence." Defendant argued he would not have been charged as an inmate in possession of a weapon if he had been serving a life sentence, he was being "selectively prosecuted for not having a prior serious conviction on his record," and the discrimination was "arbitrary and unjustifiable."

Defendant's motion sought discovery of certain documents from KVSP and CDCR about charges filed against other prison inmates, and charging criteria on weapons offenses.

On March 11, 2013, the prosecutor filed opposition to defendant's *Murgia* motion for discovery, and argued defendant had already received sufficient informal discovery in November 2012. The prosecutor asserted the current *Murgia* motion was frivolous, because defendant filed a second request for informal discovery on the same day and failed to give the People any time to respond.

Withdrawal of Murgia discovery motion

On May 29, 2013, the court convened a hearing on defendant's pending discovery motions. Defense counsel stated that the *Murgia* discovery motion had been dropped from the calendar without prejudice. Counsel explained the parties were discussing additional informal discovery, and he might refile the *Murgia* motion once the discovery request was narrowed down.

Defendant's subpoena duces tecum

On June 20, 2013, defendant served a subpoena duces tecum on the custodian of records for KVSP for disclosure of the following records, compiled for the period from July 28, 2010, to the date of the motion.

1. All CDCR records of crime incident reports and rules violation reports for possession of a weapon; possession of a deadly weapon; possession of contraband involving deadly weapons or sharp objects; section 4502, subdivision (a) violations for manufacture or possession of deadly weapons; and possession of dangerous property, committed by inmates in KVSP;

2. Any records of written or informal charging criteria used by KVSP with respect to referring crime incident reports for the violations described in paragraph No. 1 to the Kern County District Attorney's Office; the relevant Memorandum of Understanding (MOU) regarding referral and charging criteria; and all policies regarding filing or referral of such cases against life versus non-life prisoners;

3. All records of cases filed in the Kern County Superior Court for the alleged violations described in paragraph No. 1; and

4. All records of cases that were referred to, and then rejected for filing, by the Kern County District Attorney's Office for the violations described in paragraph No. 1, and all records for cases rejected by KVSP to refer to the district attorney.

CDCR's Motion to Quash

On June 26, 2013, CDCR filed a motion to quash defendant's subpoena duces tecum of June 20, 2013, and argued it was overbroad, unduly burdensome, oppressive, and sought documents that were not in CDCR's custody.

Hearing on Motion to Quash Subpoena

On July 8, 2013, Judge Bush conducted a hearing on CDCR's motion to quash defendant's subpoena for documents, filed in June 20, 2013. Defendant was present with counsel. An attorney from CDCR was also present. The prosecutor did not appear.

The court asked the parties whether they had talked about resolving the discovery matter. CDCR's attorney said he discussed the matter with defense counsel, he believed most of the information was available through the district attorney's office, but defense counsel declined to narrow the scope of the motion. As a result, CDCR brought the motion to quash. Defense counsel replied that CDCR seemed to concede that it had the requested documents.

The court asked why defendant wanted "all records of crime incidents and 115 rules violation for the past three years," as requested in item No. 1, and whether it posed "an overwhelming burden on CDCR." Defense counsel replied such evidence was necessary to prepare a motion to dismiss for discriminatory prosecution. Defense counsel said the MOU requested in item No. 2 was easily obtainable and should be provided.

The court's ruling

The court partially granted and denied CDCR's motion to quash.

The court granted CDCR's motion to quash defendant's request in item No. 1 for all the incident reports because it was "overwhelming and overly burdensome. And I just don't find good cause for that at all."

As for item No. 2, the records of written or informal charging criteria, CDCR's attorney said that could be fulfilled by the "Memorandum of Understanding" between CDCR and the Kern County District Attorney's Office. The court denied CDCR's motion to quash for that document and ordered discovery of the MOU to defendant.

As for item No. 3, the record of cases filed in superior court, the court ordered discovery of the log of cases which CDCR referred to the district attorney's office, "but what I won't order is that each of these recorded incidences indicate what the defendant was serving for, the time of the offense and the date that was requested." The court partially granted CDCR's motion to quash on item No. 3 to the extent that CDCR did not "have to go through and flag which ones involve weapons. Just the log." The court ordered discovery of the log for the period between January 1, 2011 to July 8, 2013.

As for item No. 4, a list of cases rejected for filing, the attorney for CDCR said such a list would be included in the log provided for item No. 3, and the district attorney would also have that information. The court denied the motion to quash on that item.[3]

[3] On appeal, defendant asks this court to review the court's rulings on July 8, 2013, as to CDCR's motion to quash, where it denied discovery for item No. 1; and ordered limited discovery for item No. 3.

Memorandum of Understanding

The MOU between KVSP/CDCR and the Kern County District Attorney's office (KCDA) was disclosed to defendant pursuant to the court's discovery order. As we will explain below, defendant relied on the MOU to file his subsequent motion to dismiss based on the alleged discriminatory prosecution.

The MOU states that it establishes "guidelines for the submission of prison cases to KCDA for filing of criminal complaints. As with investigations into crimes committed outside correctional institutions, there may be instances in which a discussion would be initiated with the prosecutor's office to determine whether or not further investigation is necessary and/or referral should nevertheless be made, based upon the unique facts of the case."

The MOU states that the prison crimes listed in sections B through E "are most common referred to District Attorney's offices having correctional facilities within their jurisdictions. However, it is *recommended* that referrals be made *only where there is likelihood that a conviction would be obtained, based on the available evidence*." (First italics in original; second italics added)

The MOU states that CDCR "shall have the legal discretion to make a determination when a case is factually unfounded or to determine lack of probable cause, and to screen out cases which do not warrant prosecution." CDCR also has discretion to determine "which cases meet the guidelines establishes herein, for submission to KCDA. KDCA shall retain final filing discretion."

The MOU lists several "prison crimes," beginning with assaults on staff which "may be referred for review where there is significant, observable injury, or where, by nature of the assault, the potential for serious injury is clear." An assault on another inmate should be referred "where there is significant observable injury or the clear potential for serious injury … and the victim is willing to cooperate with the investigation, and to testify in court." If the inmate victim was not willing to testify, "the

case should be handled administratively unless there is clear observation of the assault from its beginning by one or more employees."

In homicides cases or "any other major violent incident, immediate contact will be made with the prosecutor's office for advice and any other assistance as the investigation begins and as it progresses."

The MOU states that aggravated battery "by gassing may be referred" for prosecution, where there is clear evidence that the substance thrown was bodily fluid, and where contact with the victim was on bare skin, or on the head or neck area." A simple battery is considered a misdemeanor, and "[b]y policy, *KCDA rarely prosecutes inmates for misdemeanor charges*." (Italics added.)

As relevant to this case, the MOU addresses cases of weapons possessions in violation of section 4502 as follows:

> "Cases that may be referred: (1) *when the inmate is in actual possession of the weapon (in his hands, clothing, or body cavities*); or (2) when it is found secreted in his personal property or cell and there is admissible confession or admission of ownership; or the inmate's fingerprints are found on the weapon. Care should be taken to insure that if the weapon has the appearance of a knife, i.e., *that it is a 'sharp instrument'*, as required by Section 4502; or (3) with the exception of a 'keister' stash, or the secretion of contraband in large or unmovable objects, all containers of the seized items (clothing, books, personal property) must be secured and processed as evidence: or (4) where it is found secreted in his personal property or his cell and there is an admissible confession or admission of ownership or the inmate's fingerprints are found on the weapon, or he is the only occupant of a single cell. Care should be taken to document that if the weapon has no characteristics of a shank, that it is a 'sharp instrument', as required by PC 4502(a)." (Italics added; underlines in original)

The MOU then turns to cases where inmates are found in possession of narcotics:

> "Like possession of weapons by inmates, (above), cases should be referred (a) when the inmate is in actual possession of the contraband (hands, clothing, or body cavity); or (b) when it is found secreted in his personal property or his cell and there is an admissible confession or admission of the ownership, or the inmate's fingerprints are found on the contraband."

The MOU includes the following caveat about drug cases:

> "However, a second issue arises in drug possession cases as to inmates. *The practical wisdom of filing the charges where the sentence is not required to run consecutive, unlike section 4502, mitigates against the filing of such charges. If the inmate is already serving a lengthy sentence, the most appropriate sanction may be the administrative disciplinary action, which is swifter, surer and more economical than formal prosecution*. **NOTE:** Where there is evidence of "dealing" by the suspected inmate, or there are multiple recurring instances of possession by a particular inmate, a referral to the prosecutor's office noting these additional factors is appropriate. *Judicial economy and practical considerations preclude prosecution of inmates in possession of minor amounts of marijuana*. All cases where inmates are in possession of hard narcotics or narcotic paraphernalia, (e.g., hypodermic needles) may be submitted for evaluation if the criteria in the MOU are met." (Italics added.)

The MOU addresses criteria for indecent exposure and escape offenses. Finally, it has a separate section for "Other Crimes" which states:

> "*In most common instances*, the following cases will not be referred:
>
> "1. Cases involving inmate versus inmate when there is insignificant bodily harm or unwillingness by the victim inmate to cooperate or testify.
>
> "2. Possession of weapons or contraband in cells or common areas where control of the weapon or contraband cannot be established,
>
> "3. *Possession of a weapon where the inmate has a life or lengthy sentence and the most appropriate resolution will be effected via administrative disposition*.[4]
>
> "4. Possession of narcotics or drugs when a usable quantity does not exist.
>
> "5. *Cases considered to be in the gray area will be referred for guidance or evaluation by the DA*.
>
> "It is agreed that if a case exists wherein it is believed the prosecution criteria appears to be *borderline*, or there is a desire by the Institutional

[4] As we will discuss below, defendant cites this lone paragraph from the MOU in support of his claim that he was subject to a discriminatory prosecution since only non-life-term inmates are charged with possession of a weapon.

> Investigative Services Unit for a review of an incident on the part of the District Attorney's Office, this opportunity will be afforded." (Italics added.)

Refiled *Murgia* motion for discovery

On October 23, 2013, defendant refiled his *Murgia* motion for discovery and argued he was subject to discriminatory prosecution because KVSP and the district attorney's office deliberately singled out inmates serving nonlife sentences for prosecution. The motion was supported by the MOU and others exhibits consisting of the materials which the court had previously ordered disclosed.

Defendant argued the MOU showed an agreement between KVSP and the district attorney's office, that cases involving an inmate's possession of a weapon would not be referred for prosecution when the inmate is serving a lengthy or life sentence.

Defendant asserted that since he was serving a determinate term, and he was not a life prisoner, the criminal charge filed against him was discriminatory, unjustifiable, and arbitrary, and he was being "selectively prosecuted" for not having a more serious record. Defendant further asserted additional discovery was needed to support a motion to dismiss.

Defendant's *Murgia* motion sought discovery of additional records for the period from July 28, 2010, to the time of the motion for the following:

> 1. All arrests and CDCR rules violations for section 4502, subdivision (a) offenses, at KVSP, including the date of the offense, and the sentence the offender was serving at the time of the offense;
>
> 2. Any written or informal charging criteria used by CDCR for referring a simple violation of a section 4502, subdivision (a) weapons charge to the district attorney's office;
>
> 3. Any written or informal charging criteria used by the district attorney's office for filing charges for a section 4502, subdivision (a) violation, and any and all policies for filing such cases against non-life and life prisoners;
>
> 4. All cases filed by the district attorney for section 4502, subdivision (a) offenses, in KVSP, including the date of the offense and the sentence being served by the offender at the time of the offense; and

5. All cases rejected for filing by the district attorney's office for section 4502, subdivision (a) offenses, including the date of the offense and the sentence being served by the offender at the time of the offense; and any recorded or reported reasons why the case was not filed.

The People's opposition to motion

On October 28, 2013, the People filed opposition to defendant's *Murgia* motion for discovery, and argued defendant failed to meet the standard to prove an invidious discriminatory prosecution. The prosecutor stated that the district attorney's office filed cases in accordance with lawful charging standards, based on whether the charges could be proved beyond a reasonable doubt.

Defendant's reply to the opposition

On November 4, 2013, defendant filed a reply to the opposition, and argued that discovery should be ordered for all cases which reached the district attorney's office involving an inmate's possession of a weapon at KVSP.

Defense counsel also disputed the People's account of the case involving inmate Nelson Hernandez because he was not similarly situated as defendant: Hernandez was housed at Tehachapi State Prison rather than KVSP; he charged with possession of a weapon and drugs; and he pleaded guilty.

Hearing on *Murgia* motion

On November 5, 2013, Judge Bush held a hearing on defendant's refiled *Murgia* motion for discovery. The prosecutor argued defendant's pending motion was moot because the discovery issues were already litigated.

Defense counsel argued defendant was subject to discriminatory prosecution because he was serving a determinate term, and the district attorney's office did not charge an inmate with possession of a weapon if the inmate was already serving a life term.

The court asked defense counsel to clarify whether his pending motion was for additional discovery or to dismiss for discriminatory prosecution. Defense counsel replied he was asking for additional discovery. Counsel explained his initial *Murgia*

motion for discovery was removed from the calendar without prejudice in March 2013. He then filed a motion for discovery from third parties, which was partially granted.

Defense counsel said his pending motion relied on the materials received from the third-party discovery order, which showed "that very few cases have actually even reached the District Attorney's Office." Item Nos. 4 and 5 in the refiled *Murgia* motion was for discovery about "what sentences those inmates were serving at the time that those cases were either accepted or rejected by the District Attorney's Office," and the district attorney had that information.

The court reviewed defendant's pending motion and asked whether he had already received item Nos. 1, 2, and 3. Defense counsel clarified that item Nos. 1 and 2 "should have been withdrawn" because they had already been addressed in the previous discovery motion and order.

Defense counsel explained item Nos. 3, 4, and 5 were for discovery of evidence about the type of sentence an inmate was serving when the district attorney decided whether or not to charge him with possession of a weapon.

The court again tried to clarify defendant's motion and underlying argument:

> "THE COURT: Your concern is that individuals who are serving life sentences are generally not charged with possessing weapons. Is that your concern?
>
> "[DEFENSE COUNSEL]: That would ultimately be the basis of the *Murgia* dismissal motion.
>
> "THE COURT: If there is a rational reason for the District Attorney's Office not to charge somebody who is serving life with possession of a weapon, that would necessitate – that would call for a denial of your motion.
>
> "[DEFENSE COUNSEL]: *The status of life versus non-life [inmate] would go under a rational basis of scrutiny. They would have to put forth some reasonable basis for prosecuting, making that decision to separate those persons out.*

> "THE COURT: *I think it's rational on its face, to be honest with you. Why would they continue to file cases against someone doing life when the allegations were possession of a weapon?* If the individual was already doing life, consider time, effort and today's economy, lack of courtrooms, lack of attorneys, lack of judicial resources, why they would prosecute." (Italics added.)

The court stated "on its face there is a rational reason why the District Attorney's Office would not file a charge on a lifer who is simply charged with having a weapon. I think on its face there is a rational reason…." Defense counsel stated there was no rational basis because it would cost more money to "keep those people in prison even longer." The court replied that it would cost even more money to prosecute inmates "who are already doing life when the reality is nothing else can happen to these folks."

The court asked the prosecutor to comment on the discovery motion. He said that the MOU, which had been disclosed pursuant to the prior discovery order, complied with item No. 3 in the pending *Murgia* discovery motion.

The prosecutor argued that in item Nos. 4 and 5, defendant wanted all cases filed and rejected for violations of section 4502. The prosecutor stated the request was unduly burdensome, time consuming, and not relevant, and the status as a life or non-life term inmate was not a protected class. The prosecutor cited to the MOU's standards and argued:

> "With defense counsel's rationalization, we would end up moving that to drugs, minor quantities of drugs, marijuana found in prison. *We couldn't file any of those or we would have to file all of them or none. And here it's the same thing. It's an all or nothing*. There is no discretion with the District Attorney's Office. Here those are public records. And I believe if we were look at all the cases that were filed by the D.A.'s Office regarding [violations of section 4502], over 90 percent of them would have been handled by the Public Defender's Office. So they would have records of that. And the information that they are seeking they could probably find in CJIS.
>
> "For us to go back and review every case that we have rejected and filed and give them the names of all of those inmates and the time that they were serving, we are simply doing their work for them. And I believe the end result is going to be the same … at the end of the day, this is

> discretionary prosecution, not discriminatory. And, two, I believe defense counsel knows, there are life cases where the inmate's been in possession of a weapon, we filed it. And I believe this court's well aware of that. We file life cases, cases of life inmates, for weapons possession. It's just one thing that [KVSP] looks at in making their decision as to whether or not to send the case to us. But typically, when we receive a case, if the elements are there, we file it." (Italics added.)

The court agreed that more than 90 percent of inmates charged with committing crimes in prison are represented by the public defender's office. The court asked defense counsel (a deputy public defender) whether his office could conduct a computer inquiry to determine "who has been charged with certain offenses," and why defendant should make the prosecutor's office conduct that search.

Defense counsel said his office had not attempted to conduct such a search, and he did not know if it was possible "unless we started going through the … case numbers one by one to see what they were charged as…."

The court's ruling

The court partially granted and denied defendant's *Murgia* motion for discovery.

The court clarified that defense counsel had withdrawn his motion for item Nos. 1 and 2.

As to item No. 3, written or informal charging criteria, the court again clarified that defendant received that information in the MOU. Defense counsel said he did not know if there was additional information about charging criteria. The prosecutor replied that the MOU contained all the charging criteria. The court concluded item No. 3 had been satisfied and defendant did not object.

As to item No. 4, cases filed, the court denied the request without prejudice and directed defense counsel to research the public defender's records to look for those cases.

> "You are to determine if your office can … conduct a query of the computer system. If you can't, I'd like an explanation of why can't you. If You can't, the question would become can somebody else and can the court, can the D.A.'s office."

As for item No. 5, cases which had been rejected for filing, the court denied that request with prejudice because it was "overburdensome and too time-consuming." The court found the district attorney's office could put forth "a rational reason without having to go through every single case and say why they didn't file in this particular defendant or that particular inmate."[5]

Defendant did not file any additional discovery motions.

DEFENDANT'S MOTION TO DISMISS

On November 19, 2013, defendant filed a motion to dismiss the charges for discriminatory prosecution pursuant to *Murgia*. Defendant asserted that according to the MOU, inmates were not charged with possession of a weapon when they had "a life or lengthy sentence and the most appropriate resolution will be effected via administrative disposition."

Defendant argued that he was not a life prisoner, and he was serving a determinate sentence with the earliest possible release day in January 2015. He was alleged to have possessed a sharp instrument in July 2011, a period covered by the MOU. Defendant argued that his status as a nonlife inmate factored into the decision to prosecute him for possession of a weapon, and he would not have been prosecuted if he had been serving a life term. Defendant argued he was being selectively prosecuted "for not having a 'bad enough" record, and the prosecution was arbitrary and unjustifiable.

Defendant asserted that the documents previously provided through discovery showed that only a small percentage of cases were filed which charged inmates with possession of weapons. Defendant argued the statistics led to inferences of discriminatory intent, presuming the MOU was followed and the status of an inmate "as a

[5] Defendant never filed another motion for discovery, or advised the court that he was unable to obtain the information sought in item No. 4 from the public defender's records, as ordered by the court. On appeal, defendant seeks review of the court's rulings on item Nos. 4 and 5, and again fails to address whether he attempted to obtain the information requested in item No. 4 from the public defender's office.

nonlife inmate factored into [the prison's] and the district attorney's decision to prosecutor those individuals for possession of a weapon offense when those agencies would not have prosecutor other inmates who were serving life or lengthy sentence who allegedly committed the same offense."

Hearing on Motion to Dismiss

On November 21, 2013, Judge Bush held a hearing on defendant's motion to dismiss.[6]

Defense counsel acknowledged the court was familiar with the case and had ruled on the previous discovery motion. Counsel argued the case should be dismissed for discriminatory prosecution because he was charged with possession of a weapon, a life-term inmate would not have been criminally charged, and he was similarly situated to a life-term inmate even though he was serving a determinate term. There was no rational basis not to punish an inmate with a more serious record, and to punish more seriously an inmate with a less severe record.

Defense counsel acknowledged the state's reason for not charging life inmates was not to waste resources, but attacked that reason because "the distinction actually costs the state more money by keeping determinate prisoners in prison longer and housing them; so I think it would actually cost more money."

The prosecutor replied the motion to dismiss was disingenuous because defense counsel was personally aware that the district attorney's office charged life-term and non-life-term inmates with the same types of offenses. The prosecutor had personally filed eleven weapons cases against inmates between July and November 2012, and he did not know the inmates' life status.

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[6] Defense counsel only addressed the *Murgia* motion to dismiss. He did not discuss the court's previous discovery order, request additional discovery, or state whether he attempted to obtain the materials described in item No. 4 from the public defender's office, as directed by the court.

The prosecutor noted the MOU granted CDCR with discretion to determine whether a case was factually unfounded or lacked probable cause, or whether it should be referred to the district attorney. As for the MOU's discretion about not filing charges against life inmates, it was "in the interest of judicial efficiency for us to do it this way."

The prosecutor concluded there was no evidence that defendant was the subject of a discriminatory prosecution, and "I find it hard to believe that a nonlife inmate is a protect[ed] class [under any] stretch of the imagination."

The court's denial of the motion to dismiss

The court found defendant had not met his burden to show discriminatory prosecution and denied his motion to dismiss without comment further comment.

PLEA AND SENTENCE

On December 2, 2013, an amended information was filed which charged defendant with count I, possession of weapon while confined in a penal institution, with one prior strike conviction and two prior prison term enhancements.

On the same day, defendant pleaded no contest to count I and admitted the prior conviction allegations.

On January 14, 2014, the court denied defendant's motion to dismiss his prior strike conviction. Defendant was sentenced to the lower term of two years, doubled to four years as the second strike term; the other enhancements were stricken. The court ordered defendant to serve the four-year term consecutive to the term he was already serving.

APPELLATE CONTENTIONS

On appeal, defendant again sets forth his theory of discriminatory prosecution: CDCR and/or the district attorney's office "engaged in discriminatory prosecution by deliberately choosing to prosecute inmates, such as [defendant], who were serving less than life terms and excluding from prosecution inmates who were serving life terms." To

that end, defendant challenges both the court's denial of certain discovery requests, and the subsequent denial of his motion to dismiss for discriminatory prosecution.

As for discovery, defendant acknowledges the court granted numerous elements of his discovery motions – including the entirety of his refiled *Murgia* motion for discovery – but argues the court should have denied CDCR's motion to quash as to all evidence sought in his subpoena. Defendant asserts that the court's denial of "full discovery" was prejudicial because the evidence would have "shed light" on his equal protection claim that life-term inmates were not charged with weapons offenses and supported his motion to dismiss. In making this argument, defendant does not address his failure to advise the court whether he was able to obtain certain information from the public defender's records, as ordered by the court.

Defendant further argues the court should have granted his motion to dismiss because the MOU establishes "clear evidence" that CDCR would not refer weapons possessions cases for prosecution where an inmate was serving a life or lengthy sentence. Defendant asserts he is "similarly situated with a prison inmate serving a life term who possessed a sharp instrument while in prison." He states CDCR and the district attorney's office followed the MOU's policy that his status as a nonlife-term inmate "factored into the decision by the prison to refer the case for prosecution, and into the decision by the district attorney's office to prosecute him." Defendant thus concludes this case "amounts to arbitrary and unjustifiable discrimination" because he was deliberately singled out for prosecution on the basis of some invidious criterion, since he was "nearing the end of a determinate sentence of 16 years." "This criterion employed in the MOU regarding referral and prosecution vs. administration action is invidious, or objectionable, because it is arbitrary and nonsensical."

DISCUSSION

The entire basis of defendant's motions for *Murgia* discovery and dismissal is his argument that he was only prosecuted because of his status as a nonlife term inmate who

was serving a determinate term and found in possession of a weapon; whereas he would not have been prosecuted if he had been a life-term inmate. He declares the court's failure to grant the entirety of his discovery requests was prejudicial since it would have supported his motion for dismissal, and showed that his prosecution violated equal protection because he was similarly situated as a life-term inmate. Defendant never claimed he was charged because of his race, religion, or other suspect class, or that discovery would have revealed such a reason for the prosecution.

We need not address each of defendant's discovery contentions because his arguments in support of both his discovery and dismissal motions are flawed. He has failed to show that inmates serving determinate terms are similarly situated as life-term inmates, such that the charging decisions by CDCR and/or the district attorney are based on an invidious and arbitrary classification. We also find a rational basis for the charging decisions based on the resources, needs, and costs for CDCR and the district attorney.

As set forth above, in order to establish a claim of discriminatory prosecution, " 'the defendant must prove: (1) "that he has been deliberately singled out for prosecution on the basis of *some invidious criterion*"; and (2) that "the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities." ' " (*Baluyut, supra,* 12 Cal.4th at p. 832, italics added.) " '[A]n invidious purpose for prosecution is one that is arbitrary and thus unjustified because it bears no rational relationship to legitimate law enforcement interests ....' [Citation.]" (*Manduley v. Superior Court, supra,* 27 Cal.4th at pp. 568–569.) "The defect lies in the denial of equal protection to persons who are singled out for a prosecution that is 'deliberately based upon an unjustifiable standard *such as race, religion, or other arbitrary classification*.' [Citation.]" (*Baluyut, supra,* 12 Cal.4th at pp. 831–832.)

Thus, in order to prevail in an equal protection argument, the defendant must first show that "the state has adopted a classification that affects similarly situated groups in an unequal manner. [Citation.]" (*People v. McCain* (1995) 36 Cal.App.4th 817, 819.) If

two groups are not similarly situated, we need not analyze the equal protection claim any further. (*In re Jose Z.* (2004) 116 Cal.App.4th 953, 960.)

" 'Equal protection applies to ensure that persons similarly situated with respect to the legitimate purpose of the law receive like treatment; equal protection does not require identical treatment. [Citation.]' [Citation.] The state 'may adopt more than one procedure for isolating, treating, and restraining dangerous persons; and differences will be upheld if justified. [Citations.] Variation of the length and conditions of confinement, depending on degrees of danger reasonably perceived as to special classes of persons, is a valid exercise of power.' [Citation.]" (*People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1216–1217; *People v. McKee* (2012) 207 Cal.App.4th 1325, 1335.)

Offenders who commit different crimes generally are not similarly situated, such that different treatment of certain offenders is permissible under the equal protection clause. (*People v. Doyle* (2013) 220 Cal.App.4th 1251, 1266; *People v. Macias* (1982) 137 Cal.App.3d 465, 472–473; *People v. Dillon* (1983) 34 Cal.3d 441, 476; *People v. Jacobs* (1984) 157 Cal.App.3d 797, 803–804.) For example, capital and noncapital defendants are not similarly situated such that " 'equal protection principles do not mandate that capital sentencing and sentence-review procedures parallel those used in noncapital sentencing.' [Citation.]" (*People v. Souza* (2012) 54 Cal.4th 90, 142.) Defendants with a history of prior serious or violent felony convictions are not similarly situated to those without such histories, and it is not a violation of equal protection to treat recidivist felons more harshly than defendants without such records. (*People v. Cooper* (1996) 43 Cal.App.4th 815, 829–830; *People v. Edwards* (2002) 97 Cal.App.4th 161, 164; *People v. Cressy* (1996) 47 Cal.App.4th 981, 994.)

The trial court did not abuse its discretion in ruling upon defendant's discovery motions and denying his motion to dismiss. Defendant was not subject to invidious discrimination in violation of equal protection because he was not similarly situated as a life-term inmate. We think this case is similar to the situation addressed in *People v.*

Montes (2014) 58 Cal.4th 809 (*Montes*), where the defendant argued he was subject to discriminatory prosecution for capital murder because the victim was related to law enforcement officers. *Montes* rejected this argument because the defendant failed "to provide authority that this type of victim status constitutes an unjustifiable or arbitrary classification under federal equal protection." (*Id*. at pp. 829–830, fn. omitted.)[7] In this case, defendant has similarly failed to provide authority that the penal status of an inmate constitutes an unjustifiable or arbitrary classification under equal protection standards.

Moreover, we agree with the court's findings at the November 5, 2013, discovery hearing, that the MOU's charging criteria should be reviewed under the rational basis standard, and it was reasonable not to file minor charges against an inmate already serving a life term based on concerns of judicial economy. Defendant effectively conceded this point: "They would have to put forth some reasonable basis for prosecuting, making that decision to separate those persons out."

We agree with the People that the MOU charging guidelines are not arbitrary. The guidelines are based on sound rationales – judicial economy; availability of other, suitable alternatives for life inmates, such as administrative action; avoiding wastefulness when lesser alternatives achieve the purpose of the institution; and avoiding the expense of resources to prosecute additional crimes whose sentences would make no appreciable contribution to penal objectives.

As set forth in the MOU, weapons cases are referred for prosecution when the inmate is found in "actual possession" of the object, "in his hands, clothing or body cavities." Defendant was clearly within this category since he was found in actual possession of a weapon that had been secreted and discharged from his body cavity. The MOU compares drug cases to weapons cases, and acknowledges the "practical wisdom"

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[7] The defendant in *Montes* separately argued he was subject to discriminatory prosecution based on the victim's race; the court considered and rejected this argument on the merits. (*Montes, supra,* 58 Cal.4th at pp. 830–832.)

of not filing charges when the potential sentence would not be consecutive to the term the inmate was already serving. "If the inmate is already serving a lengthy sentence, the most appropriate sanction may be the administrative disciplinary action, which is swifter, surer and more economical than formal prosecution." The MOU also states a policy consistent with "judicial economy" that certain cases will not be referred, including weapons cases where the inmate is serving "a life or lengthy sentence and the most appropriate resolution will be effected via administrative disposition."

We thus conclude that the court did not abuse its discretion when it ruled upon defendant's various discovery motions, and denied defendant's motion to dismiss, because he was not subject to discriminatory prosecution on the basis of some invidious criteria.

DISPOSITION

The judgment is affirmed.

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POOCHIGIAN, Acting P.J.

WE CONCUR:

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FRANSON, J.

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SMITH, J.